

AARON BURR AND THE ELECTORAL TIE OF 1801: STRICT CONSTITUTIONAL CONSTRUCTION

*Jennifer Van Bergen**

Although it has long been established that Thomas Jefferson came into the presidency in 1801 by a bargain struck with the Federalists and that Aaron Burr repeatedly refused to forge a deal with that party in exchange for their votes, scholars still claim that Aaron Burr was an apostate who schemed to steal the Presidency. This view of Burr began in 1801. Prior to that, Burr enjoyed over twenty-five years of favor in the public eye. But, during the tie of 1801, the tables turned. At first, Jeffersonians were pleased that Burr willingly disclaimed competition with Jefferson during the electoral tie. But, Burr's refusal to agree to Republican requests that he resign if the Federalist-dominated House elected him, ultimately came to be viewed by Jeffersonians as virtual treason.

This was the start of Burr's fall from grace. From that point on, others viewed Burr's actions through the lens of this event—or rather, through the inferences and erroneous judgments built upon this event.

Whatever Burr's role may have been in the genesis of these inaccurate views, there is no doubt that Burr's life was shattered by them. At this late juncture, there is no way to put Burr back together again. To many, Burr's place in American history seems just, if not preordained. Once a portrait becomes settled in our collective memory, our memory may serve in place of fact. It is difficult, then, to undo a false impression and put a life back together again once it has been shattered. I make no attempt herein to do so.

However, no special treatment is needed to discover the utter lack of mystery behind Burr's actions in the tie of 1801. Put simply, Burr acted in strict adherence to the Constitution, while Jefferson and his cronies did not. Because Burr refused both to agree to resign if elected

* Adjunct Professor, The New School University.

and to make a bargain with the Federalists, he was, as he put it, “insulted by those who used my Name for having suffered it to be used.”¹

If the facts are viewed objectively, it seems clear that Jefferson won by contravening the Constitution and Burr lost because he upheld that document. Which man would you rather have had as President?

In this article, I will show that Burr adhered strictly to the United States Constitution, and that he would have been contravening the Constitution if he had promised to resign. Although this conclusion requires a strict construction of the Constitution, I will establish that this was the only way for Burr to construe the new Constitution. Any other interpretation of that document would have been a betrayal of a far greater magnitude.

Burr’s interpretation is open for discussion and analysis, but no scholar has bothered to make that effort. Indeed, it appears that neither historians nor Burr’s colleagues considered the Constitution at all in judging his actions or their own.² This collective oversight is even more unusual since it has long been established that Jefferson was a strict constructionist until 1800.³ In fact, Jefferson had himself been elected vice president in 1796 pursuant to Article II of the Constitution. However, when Burr, in refusing to manipulate the votes of Congress, relied on a literal interpretation of the same article of the Constitution—that the House, not he, was to control the election—the Jeffersonians cried treason. Why? For one thing, Jefferson being elected vice president in 1796 against the wishes of the Federalists was not the same to the Jeffersonians as Burr being elected president in 1800 against Jeffersonian wishes. Furthermore, Burr was supposed to have been campaigning for Jefferson, not for himself. The Republican Party had chosen Jefferson, not Burr, as the presidential candidate on their ticket. Thus, Burr’s refusal to defer to Jefferson, if Burr were elected, seemed like an auda-

¹ Letter from Aaron Burr to Samuel Smith (Dec. 29, 1800), in 1 *POLITICAL CORRESPONDENCE AND PUBLIC PAPERS OF AARON BURR* 479 (Mary-Jo Kline ed., 1979) [hereinafter 1 *PUBLIC PAPERS*].

² A survey of the various views that have been taken of Burr’s intentions is outside the scope of this article.

³ In the Kentucky and Virginia Resolutions, the Jeffersonians declared that Congress had exceeded its constitutional authority in enacting the Alien and Sedition Acts. They argued that the federal government was one of limited and specifically delegated powers and was a product of a compact made between the states in 1787-1788, and that the states, therefore, had the right to nullify federal governmental acts which exceeded its authority. Jefferson and Madison had also opposed the chartering of the Bank of the United States on the grounds that Congress had no authority to charter a bank. Indeed, Virginia as a whole had voted in 1788 to ratify the U.S. Constitution only on condition that “Every power not granted, remains with the people, and at their will.” *JOURNAL, HOUSE OF DELEGATES, VIRGINIA*, (1819-20), 58.

2003] *AARON BURR AND THE ELECTORAL TIE OF 1801* 93

ciously ambitious and selfish act. It was difficult then, and is more difficult now, for people to see that it was, in fact, an act of principle.

It is also interesting, however, that Jefferson considered Burr “a crooked gun” for not manipulating the votes once the election reached the House, for it would have been totally unethical if Burr, rather than the House, had decided the election. Jefferson would ostensibly have been happier had Burr done what Jefferson had been prepared to do in 1796, when he and Adams looked like they might tie. In that instance, Jefferson declared he would “defer” to Adams—in other words, resign. The United States Constitution clearly provided for the election of candidates by representatives of the people, not by the personal preferences of candidates. Jefferson’s proposed deference to Adams reflects his belief that he could, by withdrawal, choose the president despite the electoral results.

Burr’s refusal to resign in the event he was elected certainly was not treason. Indeed, strict adherence to the Constitution cannot be treason. It is, on the contrary, the mark of a leader and statesman. On the other hand, Jefferson’s secret—if plausibly deniable—concessions to the Federalists could very well be viewed as contravening the spirit, if not the letter, of the Constitution. I will take a close look at Jefferson’s actions later. Jefferson’s disapproval of Burr’s refusal to agree to resign did not justify undermining the very Constitution Jefferson claimed to stand for. The audacity and hubris of Jefferson’s attitude is undeniable. If the House had not elected Jefferson, but instead elected Burr, the will of the people would have been voiced through their representatives. Jefferson was not empowered to speak for the people, especially in the context of his own election. He had no right to interfere with a properly constituted electoral process.

The year 1800 marked a turning point in Jefferson’s views regarding constitutional construction. In 1802, Jefferson again loosened his scruples when it served his agenda to interpret the Constitution broadly rather than strictly. Although Congress had no constitutional authority to acquire new territory, Jefferson urged “as little debate as possible, and particularly so far as respects the constitutional difficulty,” during the ratification of the Louisiana Purchase.⁴ He was similarly “undeterred by his principle of strict construction of the Constitution” when he retained part of Hamilton’s financial program, and again when he decided

⁴ Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), THOMAS JEFFERSON PAPERS, available at www.memory.loc.gov/cgi-bin/query/P?mtj:2::/temp/-ammem_LGwG.

to embargo Great Britain in the years leading up to the War of 1812.⁵ As these remarks attest, scholars have noted this shift in Jefferson's policies before and after his election. But when considering Burr in comparison, scholars have ignored the discrepancy between Jefferson's view of the Constitution when it enabled him to become vice president and his view when it would have enabled Burr, instead of him, to become president. Jefferson viewed the Constitution as being dissolvable by the people at any time—not a strong endorsement of that document from one of the nation's leading statesmen and the principal author of the Declaration of Independence. Burr, on the other hand, showed complete confidence in the Constitution. Perhaps foolishly, he bet his career on this confidence, and lost.

The Federalists lost, too, when they bet on the presidential election of 1800. Jefferson's presidency marked the beginning of almost thirty years of Republican rule. However, the Republicans were not, at first, the clear victors in the election. As the final votes were tallied, it became clear that the Republican running mates for president and vice president, Thomas Jefferson and Aaron Burr, respectively, had received the same number of electoral votes. Pursuant to Article II, § 1, Paragraph 3 of the Constitution, in the event of a tie in the Electoral College, the vote was to go to the House of Representatives. When Jefferson and Burr tied, this is exactly what happened. Yet, the House of Representatives immediately deadlocked.

It had been clear by mid-December 1800, that Burr and Jefferson were going to tie, but the Electoral College votes would not be officially counted in Washington until February 11, 1801. As the congressmen filtered into Washington throughout January, rumors swirled that Burr might be convinced to accept a deal with the Federalists in exchange for their House votes. By the time official voting began, there was tremendous confusion regarding Burr's loyalties, the Federalists' intentions, and the fate of the country itself.

ELECTIONEERING UNDER ARTICLE II

The Framers of our Constitution intended that our government be nonpartisan. They did not anticipate the rise of a two-party system.⁶

⁵ A. J. Beitzinger, *Political Theorist*, in *THOMAS JEFFERSON: A REFERENCE BIOGRAPHY* 98 (Merrill D. Peterson ed., 1986) (1858) [hereinafter TJRB].

⁶ See CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, 303 (1986) [hereinafter COLLIER].

Alexander Hamilton wrote in the very first issue of *The Federalist Papers* that “nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties.”⁷ Late eighteenth century Americans had lived through the Revolutionary War. They knew what partisanship could do. To the men who worked to design a government that could withstand the test of time, providing for political parties “would have seemed perversely self destructive.”⁸

Thus, the Framers of the Constitution attempted to create a fair electoral system that balanced a variety of interests.⁹ Hamilton considered this electoral system if “not perfect . . . at least excellent,” and “much less apt to convulse the community” than a direct popular vote.¹⁰ He added that the “mode of appointment of the Chief Magistrate”—e.g., the Electoral College—united “in an eminent degree all the advantages, the union of which was to be wished for.”¹¹ This system, then, was included in the new Constitution under Article II, § 1, Paragraph 3.

This paragraph provides that the “[P]erson having the greatest Number of Votes shall be the President,” and “after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President.” This was the clause by which Jefferson was elected vice president in 1796. If there is a tie in the Electoral College, Article II provides that “the House of Representatives shall immediately chuse [sic] by Ballot one of them for President.” Once in the House, “the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice.”¹²

Article II was endorsed by the leading members of the Constitutional Convention in 1787. Interestingly, James Madison, a close friend of Jefferson’s, was one of its authors.¹³ As noted above, Hamilton publicly endorsed it, as well. As long as George Washington was able to serve as president, the system worked fine. But when Washington an-

⁷ THE FEDERALIST NO. 1 (Alexander Hamilton).

⁸ Peter S. Onuf, Book Review, 39 AM. J. LEGAL HIST. 277 (Apr. 1995) (reviewing TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804 (1994)).

⁹ See COLLIER, *supra* note 6, at 300-4.

¹⁰ THE FEDERALIST NO. 68 (Alexander Hamilton).

¹¹ *Id.*

¹² U.S. CONST. art. II, § 1, cl. 3. (amended 1804).

¹³ See COLLIER, *supra* note 6, at 302.

nounced his intention to retire, a problem emerged. Without him, the election for president became a more hotly contested issue and political parties fully emerged. As one historian has described it, this new problem compelled a party to carefully manipulate the electoral machinery to ensure that its vice presidential candidate did not defeat its presidential candidate. Certain electors had to be directed not to cast their votes for their party's vice presidential candidate so as to avoid a tie. That practice, however, created the risk that the opposing party's presidential candidate would be elected vice president.¹⁴

This is exactly what happened in the election of 1796. John Adams was elected president, and his political rival, Thomas Jefferson, was elected vice president. This event certainly caused distress within the Federalist party.¹⁵ But oddly the Congress during the Adams administration did nothing to amend the Constitution. In 1797, South Carolina congressman William L. Smith introduced a proposed amendment to the Constitution, but no action was taken on it.¹⁶

Had members of Congress—many of whom later blamed Burr—acted in 1797 to amend the Constitution, the tie of 1801 never would have happened. Thomas Fleming explains: “Loath to start amending the Constitution, the politicians of both parties had tried to steer around the dilemma by having electors drop one or two votes for the vice-presidential candidate, thus enabling the man at the head of the ticket to become the legal winner.”¹⁷ According to Fleming, the Founders had “envisioned the electors as high-minded patriots who would select the two best men for president and vice-president.”¹⁸ Whatever the reason for congressional reluctance to amend, it is clear from the party manipulation of electoral votes that some individuals were more than willing to try less direct means of getting their way. In fact, these

¹⁴ See Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 *YALE L.J.* 935, 945 n.33 (1996).

¹⁵ See CLAUDE G. BOWERS, *JEFFERSON AND HAMILTON: THE STRUGGLE FOR DEMOCRACY IN AMERICA*, 312-3 (1925) [hereinafter BOWERS].

¹⁶ Richard E. Berg-Andersson, *What Are They All Doing Anyway? An Historical Analysis of the Electoral College*, available at www.thegreenpapers.com/hx/electoralcollege.html (Sept. 17, 2000).

¹⁷ THOMAS FLEMING, *DUEL: ALEXANDER HAMILTON, AARON BURR & THE FUTURE OF AMERICA*, 93 (1999) [hereinafter FLEMING].

¹⁸ *Id.* Alexander Hamilton wrote in 1788 that electors would perform their tasks “free from any sinister bias,” and added that the system afforded a “moral certainty” that the president would be “in an eminent degree endowed with the requisite qualifications,” and that under that system there was a “constant probability” that the presidential office would be “filled by characters pre-eminent [sic] for ability and virtue.” *THE FEDERALIST* No. 68 (Alexander Hamilton).

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 97

men, including Thomas Jefferson, were quite willing to try means that contravened the clear purpose of the Constitution.

Remember that the Constitution specifically sets forth the process for handling a tie. Article II of the Constitution states that, in the event of a tie, the House of Representatives shall select the president.¹⁹ However, in 1796, before it became clear that Adams had won the presidency, Jefferson wrote Madison that, in the event of a tie with Adams, Madison should “solicit on my behalf that Mr. Adams may be preferred.”²⁰ This is pure Jefferson. Had Jefferson conceded in the event of a tie, a public relations coup would have ensued. Adams, who did not concede, would have been painted as a greedy opportunist while Jefferson would have been seen as an honest, fair-minded man of principles.

What should be made of Jefferson’s suggested backroom proposal to Adams (through Madison) that they mutually agree to override the constitutional election procedures? It is difficult to take issue with an act apparently so benign and beneficent. Even though Jefferson’s gesture favored Adams, it was still contravening the clear purpose of the Constitution, since the House of Representatives was supposed to decide in the event of an electoral tie. Relying on Jefferson’s proposal, one might conclude that it is acceptable to decide all elections through negotiations between party leaders or competing candidates from opposing parties, eliminating the need for the House of Representatives to decide ties, or even eliminating the popular vote itself.²¹

Jefferson’s subversive actions during his presidential candidacy have been largely unrecognized by modern history students, but some of Jef-

¹⁹ U.S. CONST. art. II, § 1, cl. 3.

²⁰ BOWERS, *supra* note 15, at 313.

²¹ I do not mean to suggest that these were Jefferson’s conscious objectives. There has been enough written about Jefferson’s dark side now to demonstrate that he was a deeply divided man who may not—despite his high intelligence—have fully grasped the forces within him, or the full meaning of his own acts. *See generally*, FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY (1974); DAVID LEON CHANDLER, THE JEFFERSON CONSPIRACIES: A PRESIDENT’S ROLE IN THE ASSASSINATION OF MERIWETHER LEWIS (1994); JOSEPH J. ELLIS, AMERICAN SPHINX (1997); ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997); LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963). Jefferson’s conscious objectives seem to have focused only on whether to serve at all. *See* Letter from Thomas Jefferson to James Madison (Jan. 1, 1797), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 494 (Adrienne Koch & William Peden eds., 1993) [hereinafter KOCH & PEDEN] (“The only view on which I would have gone into [the first office] for awhile was to put our vessel on her republican tack . . . As to the second [office], it is the only office in the world about which I am unable to decide in my own mind whether I had rather have it or not have it.”).

erson's contemporary opponents recognized them as such.²² In 1810, Jefferson wrote: "A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."²³ This was not a mere accidental utterance. Jefferson expressed similar sentiments on many other occasions.²⁴

Interestingly, the political maneuvering that accompanied the 1796 election served as a prelude for how Burr was treated in the election of 1800. In the 1796 election, the Virginia Republicans betrayed Burr. On June 20, 1796, Jefferson's henchman, John Beckley, wrote that "the whole body of Republicans . . . decided in favor of Burr" as Jefferson's running mate.²⁵ In September of that year, Burr began a six-week long campaign throughout Connecticut, Vermont, Rhode Island, and Massachusetts to promote the Jefferson/Burr ticket. Virginia electors had promised to back Burr, but at the last minute, they withdrew their votes for him, which publicly embarrassed Burr. Mary-Jo Kline, the editor of Burr's papers, notes that "only great pressures from the party leadership could have persuaded" the Virginian electors to "sacrifice Burr."²⁶

²² See Letter from Theodore Sedgwick to his son (Jan. 11, 1801), Mary-Jo Kline, *Editorial Note: The Electoral Tie of 1801*, in 1 PUBLIC PAPERS, *supra* note 1, at 482 (Jefferson is "not *publicly* [sic] committed against the great systems of the administration") (emphasis in original); see also Washington Federalist (Jan. 21, 25 & Feb. 6, 1801) *quoted in* 2 ALBERT BEVERIDGE, THE LIFE OF JOHN MARSHALL 540-1 n.2 (1919) [hereinafter BEVERIDGE] (stating that Jefferson "procured [and] encouraged those infamous Calumnies against those who have filled the Executive departments").

²³ Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in KOCH & PEDEN, *supra* note 21, at 556.

²⁴ See ADRIENNE KOCH, JEFFERSON & MADISON: THE GREAT COLLABORATION, 240 (law of necessity), 244-46 (empire of liberty) (1976); LEONARD W. LEVY, *Civil Liberties*, in TJRB, *supra* note 5, at 334 ("self-preservation is paramount to all law"), 337 ("an officer must risk going beyond the law when the public preservation requires"), 339 (subverted judiciary). *But see* Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in KOCH & PEDEN, *supra* note 21, at 525 ("I had rather ask an enlargement of power from the nation . . . than to assume it by a construction which would make our powers boundless. *** I think it important . . . to set an example against broad construction.").

²⁵ Letter from John Beckley to James Madison (June 20, 1796) in 1 PUBLIC PAPERS, *supra* note 1, at 267-8.

²⁶ Mary-Jo Kline, *Editorial Note: The 1796 Presidential Election*, in 1 PUBLIC PAPERS, *supra* note 1, at 269. In addition to having been "ill-used" by the Southern Republican leaders in 1796, Burr was passed over for the post of Ambassador to France in 1794 in favor of Monroe. According to Theodore Sedgwick, his defeat was due to the "insidious machinations" of the Republicans who knew that Monroe would, and Burr would not "condescend to Act as their tool. They doubtless respect Burr's talents, but they dread his independence of *them*. They know, in short: he is not one of them, and of course they will never support but always effect to support him." Letter from Theodore Sedgwick to Jonathan Dayton, (Nov. 19, 1796) at 181, n. 2.

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 99

From that point on, Burr had “no confidence in the Virginians,”²⁷ having been “[i]ll used [sic] by [Virginia] & [North Carolina].”²⁸ Later, he declared that the Virginians had “once deceived him, and they are not to be trusted.”²⁹ Indeed, Jefferson’s deference towards Adams did not carry over to Burr. Presumably the Jeffersonian Republicans considered Burr disposable. The law of necessity perhaps?

Betrayal was not only a Republican phenomenon, however. In 1796, William Blount, a Federalist, wrote that “it is generally believed that such of the Northern States as talk of Mr. Pinckney [Adams’s running mate] mean only thereby to promote Mr. Adams’s election & in the end not vote Mr. Pinckney.”³⁰

So, the Federalists succeeded in winning the presidency in 1796 with John Adams, but they did not garner the vice presidency. The Republicans had gotten Jefferson elected into that office, where he could only watch, but could do nothing. The Federalists had not risen in rebellion when the Republicans “usurped” the “will of the people” by getting Jefferson elected, but they vowed revenge.³¹ They passed the Alien and Sedition Acts, the purpose of which “was to crush the [Republican] opposition press and silence criticism of the ruling [Federalist] powers.”³² The Republicans responded with the Kentucky and Virginia Resolutions, which were “primarily intended as a protest against interference with the freedom of speech and the liberty of press.”³³

From early 1797 through late 1800, while John Adams battled a Federalist conspiracy within his own cabinet,³⁴ and Jefferson presided over the Senate, Burr got himself reelected to the New York Assembly. Even the Federalists admitted that Burr, serving in that post “[did] a great deal towards revolutionizing the State” and “cut up” Federalist influence “in almost all the upper counties.”³⁵

²⁷ *Id.* at 181 (quoting James Nicholson to Albert Gallatin, May 7, 1800).

²⁸ *Id.* at 181.

²⁹ *Id.*

³⁰ Letter from William Blount to Gov. John Sevier of Tennessee (Sept. 26, 1796), in 1 PUBLIC PAPERS, *supra* note 1, at 268.

³¹ The Federalists had “all but urge[d] secession.” BOWERS, *supra* note 15, at 411.

³² *Id.* at 376. *See generally id.* at 374-80; *see also id.* at 377 (“A strict enforcement of [the Sedition Act] would have sent Jefferson to the gallows.”).

³³ *Id.* at 409.

³⁴ *See id.* at 412-39.

³⁵ Letter from Robert Troup to Rufus King (June 24, 1800), in 1 PUBLIC PAPERS, *supra* note 1, at 420.

These acts of power politics, betrayal, and resurrection all helped to set the stage on which the election of 1800 was to be played out. And then, in 1800, a decision was made simultaneously by both the Republicans and Federalists that is astounding in light of subsequent events. The Republicans met in caucus and made a pact to pledge ALL Republican electoral votes EQUALLY for Jefferson and Burr. According to Burr's biographer, Milton Lomask, "[t]he members of the caucus realized that if this pledge was honored, the actual choice of a President would have to be made in the House of Representatives."³⁶ Lomask continues: "Caucusing at an earlier date, the Federalists had adopted the same pledge for the same reason."³⁷ John C. Miller writes that "both parties preferred to take this risk [of having the election decided by the House of Representatives] rather than impair their chances of victory in the election."³⁸

This is an astonishing revelation. Both Republicans and Federalists intended their own candidates to tie. If both parties intended a tie to occur, why, then, did they panic when it did in fact occur? Burr later called the collective reaction "absurd alarms," and told Samuel Smith "your Nerves were a little out of order."³⁹ Jefferson explained: "Our prospect as to the election has been alarming; as a strong disposition exists to prevent an election, and that case not being provided for by the Constitution, a dissolution of the government seemed possible."⁴⁰

It is well known that the disposition to prevent an election was attributable to the Federalists trying to prevent Jefferson from winning and force him to make a deal,⁴¹ but what is most fascinating about this moment is how both parties viewed the Constitution and the notion of popular will. The idea that the legislature represented the people was not new, even if the term "people" was narrower than our present-day point of view. The degree of interest in having a powerful legislature was so strong during the Constitutional Convention that it very nearly

³⁶ MILTON LOMASK, AARON BURR: THE YEARS FROM PRINCETON TO VICE PRESIDENT: 1756-1805 254 (1979) [hereinafter 1 LOMASK]; JOHN C. MILLER, THE FEDERALIST ERA: 1789-1801 259-60 (HARPER TORCHBOOKS, NEW AMERICAN NATION SERIES, 1960) [hereinafter MILLER].

³⁷ 1 LOMASK, *supra* note 36, at 254.

³⁸ MILLER, *supra* note 36, at 260.

³⁹ Letter from Aaron Burr to Samuel Smith (Dec. 29, 1800), *in* 1 PUBLIC PAPERS, *supra* note 1, at 479; Letter from Aaron Burr to Samuel Smith (Feb. 4, 1801), *in* 1 PUBLIC PAPERS, *supra* note 1, at 497.

⁴⁰ Letter from Thomas Jefferson to Martha Jefferson Randolph (Jan. 26, 1801), *in* KOCH & PEDEN, *supra* note 21, at 512.

⁴¹ See MILLER, *supra* note 36, at 267-69.

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 101

overrode the emerging doctrine of separation of powers.⁴² Yet in 1800, legislators did not seem to remember what the legislature was for: to represent the people. They did not seem to realize that the wishes of one party were not synonymous with the will of the people. Nor did they remember the wisdom of the Founding Fathers, which placed the final decision of the choice of President in the House of Representatives. The legislators appeared to have no faith whatsoever in their own Constitution. Characteristic of the legislators' attitude, Jefferson expressed: "Federalists will prefer yielding to the wishes of the people rather than have no government."⁴³ Jefferson, of course, equated "the wishes of the people" with his election to the presidency.

I will return to the legislators' attitudes later in this article. For now, one must wonder about the sense of men who could plan a tie in order to throw an election into the House without then anticipating that a tie could actually occur. John C. Miller writes: "While Jefferson had urged the Virginia electors to vote unanimously for Burr, he had expected that somewhere along the line—either in Georgia or South Carolina—a vote or two would be deducted from Burr."⁴⁴ Really? Thomas Fleming writes that "Burr had secured a promise from Jefferson's campaign manager, James Madison, that no southern elector would drop his Burr vote."⁴⁵ Whatever promises were made, however Republicans saw things, and no matter how unfortunately unsurprising these tactics might appear to us today, the fact is that neither party paid much heed to principles of democracy. Indeed, the general thinking by both parties was quite undemocratic.

In 1800, the tenseness of the situation was magnified by both the fact that the Constitution was rather new and that the father figure of George Washington no longer led the country. The infant republic was taking its first steps alone and the whole world was watching. Hamilton wrote:

⁴² COLLIER, *supra* note 6, at 301, 304, 310.

⁴³ KOCH & PEDEN, *supra* note 21, at 512. *But see* 2 BEVERIDGE, *supra* note 22, at 544-5, n.5 (A writer in the *Washington Federalist* wrote on Feb. 12, 1801: "If the tumultuous meetings of a set of factious foreigners in Pennsylvania or a few *fighting* bacchanals of Virginia, mean the *people*, and are to dictate to the Congress of the United States whom to elect as President—if the constitutional rights of this body are so soon to become the prey of anarchy and faction— . . . it would be prudent to prepare for the contest: the woeful experiment if tried at all could never be tried at a more favorable conjuncture!") (emphasis in original).

⁴⁴ MILLER, *supra* note 36, at 268.

⁴⁵ FLEMING, *supra* note 17, at 93.

The subject speaks of its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserves to be considered as the general misfortune of mankind.⁴⁶

BURR AND THE NEW YORK ELECTIONS

New York was considered the pivotal state in the presidential election of 1800. Pennsylvania, which controlled more electoral votes in 1800 and which had voted Republican almost across the board in 1796, was experiencing trouble. The Pennsylvania legislature was tied up in debates over the method of choosing those electors, and “it seemed likely that the commonwealth would be unable to deliver a single vote for any presidential candidate.”⁴⁷ Burr wrote in July 1800 that “[t]aking then the least favorable Estimate, and omitting wholly [Pennsylvania]— [Jefferson] will have sixty three Votes, which is a majority of two.”⁴⁸ Mary-Jo Kline, the editor of Burr’s papers, concluded that “New York’s twelve electoral votes, then, might be the only ones that the Republicans would receive in the middle states.”⁴⁹

Burr’s brilliance and activity in securing the New York votes effectively won the 1800 election for Jefferson. History records that, but it does not record why Aaron Burr took it upon himself to revolutionize the northern states in favor of the Republicans. It is difficult to explain Burr’s actions in light of the Republican party’s betrayal of him in 1796. Indeed, the evidence shows that Burr did not want to be made a candidate. In December 1800, he wrote: “I was made a Candidate against

⁴⁶ THE FEDERALIST No. 1 (Alexander Hamilton) (emphasis in original).

⁴⁷ Mary-Jo Kline, *Editorial Note: The New York Elections of 1800*, in 1 PUBLIC PAPERS, at 421.

⁴⁸ Letter from Aaron Burr to Pierpont Edwards (July 7, 1800), in 1 PUBLIC PAPERS, at 437.

⁴⁹ 1 PUBLIC PAPERS, *supra* note 1, at 421.

my advice and against my Will.”⁵⁰ Several months earlier, James Nicholson had approached Burr, at the behest of Republican party manager Albert Gallatin, to see if he would consider running as the Republican vice presidential candidate. According to Nicholson, Burr became “agitated—declared he would have nothing to do with the business, that the Southern States had not treated him well on a similar occasion before, [and] that he thought their promise could not be relied on”⁵¹ According to Mary-Jo Kline, when Burr found out that the Republican leaders were also asking New York Governor George Clinton to consider running and had already received a conditional acceptance from him, “Burr’s immediate reaction . . . was to declare that he would not be considered as a rival to Clinton’s tentative candidacy, and Burr’s friends were hard put to it to persuade him to keep his name on the list of candidates.”⁵² On May 7, 1800, Nicholson wrote Gallatin that “Mr. Burr however appeared averse to be the Candidate. He seemed to think that no Arrangement could be made which would be observed to the Southw[ar]d. Alluding as I understood to the last Election, in which He was certainly Ill Used by [Virginia] & [North Carolina,] I believe he may be induced to stand if Assurances can be given that the Southern States will Act fairly.”⁵³ Kline adds that “Burr’s concern was confirmed by Gallatin’s wife when she wrote the same day that [Burr] had ‘no confidence in the Virginians; they once deceived him and they are not to be trusted.’”⁵⁴ Finally, Burr wrote on October 23, 1800 to John Taylor of “Caroline”: “As to myself, after what happened at the last election (*et tu Brute!*) I was really averse to have my Name in Question—Yet so it has happened—how, is not now material; but being so, it is most obvious that I should not choose to be trifled with—.”⁵⁵

With this reluctance in tow, Burr went ahead anyway. Fleming states that, “Burr had secured a promise from Jefferson’s campaign manager, James Madison, that no southern elector would drop his Burr vote. In turn, Burr promised to arrange for someone in the North, from a safe

⁵⁰ Letter from Aaron Burr to Samuel Smith (Dec. 29, 1800), *in* 1 PUBLIC PAPERS, at 479.

⁵¹ Mary-Jo Kline, *Editorial Note: The Republican Vice Presidential Nomination*, 1 PUBLIC PAPERS, *supra* note 1, at 431-2 (quoting a certificate by John Nicholson (Dec. 26, 1803)).

⁵² *Id.*

⁵³ *Id.* at 433.

⁵⁴ *Id.*

⁵⁵ Letter from Aaron Burr to John Taylor of “Caroline” (Oct. 23, 1800), *in* 1 PUBLIC PAPERS, *supra* note 1, at 451.

Jeffersonian state like Rhode Island, to do the same deed.”⁵⁶ However, it does not really make sense that Burr would have trusted the word of the Virginia Republicans after their betrayal in 1796. As we have seen, Burr did not forget that betrayal. Rather, it seems clear that he was exceedingly reluctant to deal with them ever again. Nor is it a sufficient explanation to say that Burr succumbed to the supplications of his friends. Burr has been called ambitious and proud, but neither ambition nor pride can explain why Burr would foolishly deal with those who had clearly betrayed him before. So why did he?

Fleming believes that Burr, like Hamilton, Jefferson, and many other public servants of the period, sought fame above all else, though a different sort of fame from the one we know now. “Fame had a very special meaning, which had little to do with being famous in the current celebrity sense of the word.”⁵⁷ For late eighteenth century gentlemen, “fame was inextricably linked with honor and a special kind of achievement.”⁵⁸ Fame was based on serving one’s country honorably. This concept was derived from the essays of Sir Francis Bacon, which all three of these men “studied assiduously.”⁵⁹ Bacon classified fame into five different categories. Fleming describes these as follows:

On the bottom rung were fathers of the country, who “reign justly and make the times good wherein they live.” Next came champions of empire, leaders who enlarge their country through conquest or defend her against invaders. Next came saviors of empire, who deliver their country from the miseries of tyrants or the chaos of civil wars. Next came the great lawgivers, such as Solon, Lycurgus, Justinian. Finally, at the summit, were founders of empires, such as Cyrus of Persia and Julius Caesar of Rome. These stellar heroes were both great generals and wise legislators.⁶⁰

⁵⁶ FLEMING, *supra* note 17, at 93-4. But see Mary-Jo Kline, *Editorial Note: Electioneering in New England*, in 1 PUBLIC PAPERS, *supra* note 1, at 444 (stating that “Burr fell victim to the contagious optimism of the state’s Republican governor, Arthur Fenner, who firmly believed that the party would win some of the state’s four seats in the electoral college at the approaching elections”); Letter from Aaron Burr to James Madison (Oct. 9, 1800), *in id.* at 449 (“It will be some Consolation to you & [our republican friends] to learn that [Jefferson] will have all the Votes of R[hode]. Island”); Letter from Aaron Burr to John Taylor of “Caroline” (Dec. 18, 1800), *in id.* at 472-3 (stating that Governor Fenner “told me that he should vote for Adams and Jefferson . . . This result did not come to my knowledge in season to be communicated to you” (emphasis in original)).

⁵⁷ FLEMING, *supra* note 17, at 19.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 105

Did Burr seek reelection in order to climb the rungs of fame? If so, it may explain why, despite the Southern Republicans' betrayal, he nonetheless campaigned for the Republican cause.

An additional possibility, supported by Fleming's view, is that Burr deeply believed in Republican principles. As noted earlier, there is some basis for this assertion. Burr made several attempts to write a history of the Revolutionary War.⁶¹ He was not an ardent supporter of George Washington, whom he considered inept and monarchical, and he believed that the real heroes of the war were the soldiers who fought both for their liberty and for their rights.⁶² This was apparently going to be the basic premise of his writings, which were never completed.⁶³ Burr identified strongly with the image of the soldier and officer, which, as Fleming points out, included the honor and fame of great leadership. As discussed below, Burr's Republican news vehicle made an explicit connection between the principles of Republicanism and the Revolutionary War.⁶⁴ Thus, it seems possible that Burr might have campaigned for the Republican Party's ideals rather than for the elevation of any single candidate.⁶⁵

Whatever motivated Burr, it was universally recognized that he single-handedly secured the necessary votes in New York. Within the Republican party, his "Generalship, perseverance, Industry, & Execution," were generally acknowledged.⁶⁶ Burr's henchman, Matthew Davis, wrote that the "management and industry of Col. Burr [had] effected [sic] all that the friends of Civil Liberty could possibly desire."⁶⁷ Even the Federalists recognized his accomplishments. Robert Troup wrote

⁶¹ HERBERT S. PARMET & MARIE B. HECHT, AARON BURR: PORTRAIT OF AN AMBITIOUS MAN 337 (1967) [hereinafter PARMET]; MILTON LOMASK, AARON BURR: THE CONSPIRACY & YEARS OF EXILE: 1805-1836 370 (1982) [hereinafter 2 LOMASK].

⁶² See JAMES PARTON, THE LIFE & TIMES OF AARON BURR 613 (1858) [hereinafter PARTON] (Burr said of a noisy crowd of electioneering Democrats "They are the expounders of the Constitution!"); 1 LOMASK, *supra* note 36, at 158 ("Burr was convinced that the real heroes of the Revolution remained unsung"). Lomask states that Burr began research for this history in 1792 while he was a U.S. Senator. *Id.*

⁶³ 2 LOMASK, *supra* note 36, at 370. (Burr never wrote the history because he "no longer had a motive," his notes were lost with his daughter at sea, and his account would never be believed.)

⁶⁴ See *infra*, text accompanying notes 84-7; see also *infra* note 117.

⁶⁵ For Federalist opinion of what Burr stood for, see *infra* note 118 and accompanying text.

⁶⁶ Kline, *supra* note 47, at 425 (quoting Letter from James Nicholson to Albert Gallatin (May 6, 1800)).

⁶⁷ *Id.* (quoting letter from Matthew L. Davis to Albert Gallatin (May 5, 1800)).

that Burr had “by his arts & intrigues . . . done a great deal towards revolutionizing the State.”⁶⁸

Burr was “a consummate political campaign manager.”⁶⁹ As noted earlier, the elections in New York were crucial to winning the national presidential elections. According to Mary-Jo Kline, “[o]nly after Burr’s retirement from [the United States] Congress in 1797 is there concrete evidence of his creation of a political ‘machine’ in New York that could deliver votes for his party and give him consistent personal support.”⁷⁰

After Burr lost his United States Senate seat in 1797 due to the Virginia Republicans’ betrayal, he reentered the New York Assembly, where he remained from 1798 to 1799. During this time, Burr concentrated on building support among political allies in upstate New York.⁷¹ After he left his assembly position, he focused on the spring 1800 elections in Manhattan. “If Republicans could regain control of the city’s assembly delegation, Jeffersonians would have a majority in the lower house that would outweigh the narrow Federalist margin in the state senate. Burr’s party could then carry any measure, such as appointment of electors, that required a joint vote of the two houses.”⁷² The results of the spring elections in Manhattan would determine the composition of the legislature that would choose electors in the upcoming presidential election.

Burr initiated numerous tactics during this election that earned him the reputation as the first modern campaign manager and which later became staples of modern campaigning. First, Burr met with Jefferson in Philadelphia to inform Jefferson about the New York political situation and to obtain Jefferson’s agreement with his plans.⁷³ Then, Burr gathered his faithful followers in New York, including Matthew L. Davis, John Swartwout and his brothers, William Peter Van Ness and his brothers, and Burr’s stepson, Bartow Prevost.⁷⁴ Burr’s house “became the rendezvous of the more ardent and resolute members of the party,” who “beheld in Colonel Burr a patriot hero of the Revolution, who had mingled with their fathers on the battle-field [sic], and periled

⁶⁸ *Id.* at 420 (quoting letter from Robert Troup to Rufus King (May 6, 1799)).

⁶⁹ *Id.* at 419.

⁷⁰ *Id.* at 420.

⁷¹ *See id.*

⁷² *Id.*

⁷³ *See id.* at 420-1 (citing letter from Thomas Jefferson to James Monroe, January 12, 1800). *See also* PARMET, *supra* note 61, at 144; 1 LOMASK, *supra* note 36, at 236-7.

⁷⁴ 1 LOMASK, *supra* note 36, at 239.

his all in their country's cause."⁷⁵ Burr mandated absolute obedience to the majority in the group. No divisive local or personal interests were to be discussed.⁷⁶ He had his group prepare a roster of every voter in the city. Burr attached "little dossiers" to every name.⁷⁷ "Based on data gathered by the colonel's aides, each of these annotations described the voter's political preferences, the degree of his zeal in their pursuit, his temperament, his willingness to serve the cause as a volunteer, his financial standing, etc."⁷⁸ He sent groups of canvassers door to door to solicit donations. A list of wealthy Republicans was drawn up, and Burr decided, based on his personal knowledge of each man, which ones to ask for money and which to ask for services.⁷⁹

In order to keep himself free to maneuver in New York City, Burr did not stand for re-election to the assembly there. Rather, he allowed his name to be put on the assembly ticket in Orange County, New York. Burr's next move was to gain the collaboration of the three disparate wings of the Republican party: Clintonian, Livingstonian, and Burrite. He met frequently with the leaders of these factions to gain a consensus on strategy for the April 1800 assembly elections. As a result, only the most "distinguished individuals, venerable in years, and respected for their services" were chosen for the Republican legislative ticket.⁸⁰ According to Burr's friend and first biographer, Matthew Davis, in order to convince these candidates to stand, Burr extracted consents conditioned upon the consents of other prominent men. Thus, Judge Brockholst Livingston was persuaded to run if Governor Clinton and General Gates would serve, and General Gates agreed to serve if Clinton would stand. Clinton finally allowed his name to be used, retaining the right to claim that his name was used without permission.⁸¹ Mary-Jo Kline notes that although contemporary documents differ somewhat from this sequence, "there seems to be no reason to challenge the basic thrust of Davis's account—that [Burr] was instrumental in forming a Republican legislative ticket of far greater prestige, even fame, than was usually found in lists of nominees for the [New York] Assembly and that

⁷⁵ PARTON, *supra* note 62, at 243-4.

⁷⁶ *Id.* at 244.

⁷⁷ 1 LOMASK, *supra* note 36, at 240.

⁷⁸ *Id.* see also PARMET, *supra* note 61, at 149-50.

⁷⁹ *Id.*

⁸⁰ MATTHEW L. DAVIS, 2 MEMOIRS OF AARON BURR 55-6 (1836) [hereinafter DAVIS]. See also 1 PUBLIC PAPERS, *supra* note 1, at 421.

⁸¹ See Davis, *supra* note 80, at 57-8; see also 1 PUBLIC PAPERS, *supra* note 1, at 422.

[Burr] was personally responsible for persuading these men to stand for election in 1800.”⁸²

Another tactic Burr employed was to wait until the Federalist slate had been made public before announcing the Republican ticket.⁸³ His dramatic unveiling of the prestigious Republican ticket immediately following the announcement of a rather poor Federalist ticket presented a strong contrast to voters, one favorable to the Republicans.

At the same time, as noted earlier, Burr also utilized the services of “a lively, well-edited Republican daily newspaper,” the *American Citizen*, which quickly set about educating the public on Republican values.⁸⁴ Not only did the writers make “wide-ranging attacks upon national Federalist policy [and] the failings of New York’s incumbent Federalist assemblymen,” they also introduced a “subtler theme.”⁸⁵ On March 22, 1800, the paper asked its readers: “Why is it that all the old tories, that were opposed to the American revolution, are now so strongly and universally attached to the measures of the federal administration?”⁸⁶ While the paper touted the author of the Declaration of Independence, it did so primarily to exhort reliance upon “the principle and spirit which gave birth to the revolution” itself.⁸⁷ As noted earlier, Burr, an officer of the Revolution, is known to have expressed this principle numerous times during his life.

After three weeks of informing the public with this principled rhetoric, the newspaper directed the readers to “bring into the public service, those tried republicans—those firm and independent patriots, who were formerly the brave defenders of our country.”⁸⁸ And in the final weeks of the campaign, Burr himself spoke in public and personally remained at the polls until they closed for “*Ten Hours*, without intermission.”⁸⁹ The Republicans won all twelve of the city’s assembly seats, as well as the seats for the state senate and the United States Congress.

At this point, after Burr’s extraordinary endeavors for the Republican cause, James Nicholson was instructed to approach Burr and New

⁸² 1 PUBLIC PAPERS, *supra* note 1, at 422.

⁸³ *See id.*

⁸⁴ *Id.* at 424.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 425 (quoting letter from Matthew L. Davis to Albert Gallatin (May 1, 1800) (emphasis in original letter)).

2003] *AARON BURR AND THE ELECTORAL TIE OF 1801* 109

York Governor George Clinton to solicit them both for the post of vice president.⁹⁰ Burr's resulting agitation is understandable given the circumstances. Although Burr had not solicited any post, it was nevertheless an insult to have him compete with Clinton, who had done nothing to assist in the election.⁹¹ In addition, as previously noted, this was not the first insult Burr had received from the Republican leadership.

THE JEFFERSON/BURR DANCE: COUNTDOWN

In the presidential election, both parties were aware of the possibility of an electoral tie. Indeed, both parties attempted to make arrangements to secure the amount of electoral votes for each of their candidates that would ensure a complete victory for their party.

Despite these careful arrangements, Jefferson wrote Burr on December 15, 1800,⁹² that "it was badly managed not to have arranged with certainty what seems to have been left to hazard," and added that "it was the more material because I understand several of the highflying [F]ederalists have expressed their hope that the two [R]epublican tickets may be equal, & their determination in that case [is] to prevent a choice by the [House of Representatives] (which they are strong enough to do) and let the government devolve on a President of the Senate."⁹³ Quite a remarkable statement. Jefferson concluded by writing that he had "never once asked whether arrangements had been made to prevent so many from dropping votes intentionally, as might frustrate half the Republican wish; nor did I doubt till lately that such had been made."⁹⁴

Burr, for his part, wrote to John Taylor of "Caroline" on December 18th, in the same letter in which he discussed Rhode Island Governor's Fenney's dropped vote, that "if it should happen that the two [Republican] Candidates come out even, an event by no means expected, no Man will join with more sincerity than I shall, to place Jefferson in the Chair; and we know it to be in our power."⁹⁵

⁹⁰ See Kline, *supra* note 51, at 430 ("One of the many paradoxes of presidential politics in 1800 was that AB had won the electoral votes of New York State for a ticket that did not yet exist.").

⁹¹ Nor, by the way, had Jefferson, who by his own admission had been "entirely passive" during the election. Letter from Thomas Jefferson to Aaron Burr (Dec. 15, 1800), in 1 PUBLIC PAPERS, *supra* note 1, at 469.

⁹² See Appendix A for a complete copy of the December 15, 1800 letter from Thomas Jefferson to Aaron Burr.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Letter from Aaron Burr to John Taylor of "Caroline" (Dec. 18, 1800), *supra* note 56, at 473.

It is interesting to stop the clock here for a moment and view the scene. Burr apparently did not know of the supposed Federalist intentions to “prevent a choice by the [House of Representatives].” He did not even anticipate a tie, arguing that it was “an event by no means expected.” But his assessment was that “we know it to be in our power” to put Jefferson in office, whereas Jefferson’s assessment was that the Federalists were “strong enough” to prevent a choice from being made in the House. It appears that Jefferson was more concerned (not unrealistically) about potential dangers, and less confident of success. Burr, on the other hand, while aware of the possibility of a tie, seemed to be more confident. Perhaps Burr, having been campaigning himself, and, having won in April, felt the confidence of his success, while Jefferson, waiting anxiously in Philadelphia, and surrounded by Federalists, only felt anxiety. Furthermore, Jefferson’s victory was completely dependent upon the acts of others. Burr might have felt that his victory, as well as Jefferson’s, was in Burr’s own hands. An odd reversal of power for a presidential and vice-presidential duo.

Jefferson’s December 15 letter also prematurely announced his own success. He wrote that “[a]lthough we have not official information,” it was clear by then to both parties that “the two Republican candidates stand highest.” He continued by congratulating Burr and discussing Burr’s role in the administration.⁹⁶ He wrote that he felt “most sensibly the loss we sustain of your aid in our new administration,” and added that “it leaves a chasm in my arrangements, which cannot be adequately filled up,” closing with “I lose you from the list.”⁹⁷ By the word “administration,” Jefferson clearly meant “cabinet.” Burr, as vice president, would not be a member of Jefferson’s cabinet.

Burr must have found this letter as unsettling as his other dealings with the Virginia Republicans. Indeed, how could Burr have interpreted such a letter, so rife with mixed messages as it was? “We want you, but we lose you! We are grateful to you, but we withdraw votes from you! There is no station equal to you, but we seem to manage things badly for you! You have won, but we are passive, frustrated, and beaten down!”

As for Jefferson, considering what happened subsequently, this letter must have later embarrassed him, if only in his own eyes before Burr and his many friends. Here was Jefferson saying, with the utmost po-

⁹⁶ See Letter from Thomas Jefferson to Aaron Burr (Dec. 15, 1800), *supra* note 91, at 469.

⁹⁷ *Id.*

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 111

liteness and decorum, which under most circumstances would have been viewed as a high compliment from a great leader, that he was sorry to have lost Burr from the list (an interesting choice of words), when in another month, it looked like Burr might become the next president. Given, also, as I observed above, that Burr was in a position of relative power, while Jefferson was in a position of relative dependence, this letter must have been even more humiliating for Jefferson.

At the time, however, Jefferson acted with the absolute grace and eloquence of a statesman. Nonetheless, the reader must sense a tone of anxiety, pessimism, avoidance, dismissal, and perhaps even deceit in Jefferson's letter. While Jefferson complimented Burr "on the issue of this contest, because it is more honorable and doubtless more grateful to you than any station within the competence of the chief magistrate," and added that he felt the loss of Burr "for the substantial service of the public," the compliments were ever-so-delicately downplayed, while the negative terms were too often repeated.

In the letter, Jefferson makes numerous negative statements, including: how certain electors would "withdraw from yourself one vote," how the vote was "badly managed," how the opposition is "strong," how Jefferson is "passive," how the Republican wish might be "frustrate[d]," and how Jefferson feels "the loss we sustain" of Burr's talents, how Jefferson "lose[s] [Burr] from the list," how Jefferson is "not sure" of all the others on his list, how they might "decline" to take part, which might "force" him to take others, possibly enabling the "evil genius of this country" to "beat down" the administration. Not exactly the standard letter of a successful candidate to his running mate.

Despite the confusing and marginally hostile subtextual messages noted above, Burr's response to Jefferson was, with one exception, fairly straightforward, clear, and kind. Full of reassurances, Burr wrote Jefferson that his friends would "never think of diverting a single Vote from you—On the Contrary, they will be found among your most zealous adherents."⁹⁸ There was "no reason to doubt" Jefferson's success, there was "unanimous" support, "unremitted Zeal," and "no such Dearth of Talents or of patriotism" to fill offices in a manner that would "command public Confidence and public approbation." Nor did Burr "apprehend any embarrassment" in the event of a tie.⁹⁹

⁹⁸ Letter from Aaron Burr to Thomas Jefferson (Dec. 23, 1800), in 1 PUBLIC PAPERS, *supra* note 1, at 474. See Appendix A for a complete copy of Burr's letter to Jefferson.

⁹⁹ *Id.*

In contrast to Jefferson's dark forebodings, Burr's remarks had the strength of the sun. Burr's letter had to have irked Jefferson, even if he found the reassurances comforting. In Jefferson's mind, as indeed in everyone else's, Jefferson was supposed to be in the position of confidence and power. Thus, Burr's confidence and self-assurance must have seemed somewhat inappropriate and even mildly menacing.

Had Burr ended his letter there, Jefferson's fears might have remained vaguely attached to his political opponents. However, Burr added a statement that must have fed Jefferson's fears. Burr wrote that "[a]s to myself, I will cheerfully [sic] abandon the office of [Vice President] if it shall be thought that I can be more useful in any Active station."¹⁰⁰

What did Burr mean? Certainly, Burr meant that the Vice Presidency was a rather inactive position and he would be happy to take part in the Jefferson administration in a more active manner. For example, he could serve as an ambassador or general, two positions he had nearly obtained under prior administrations. But for Burr to accept a different position after being elected Vice President would have been no different than his stepping down if Congress elected him President, and as we shall see below, Burr never wavered from his assertion that he would adhere to the vote of Congress, even if that meant going against party wishes. Why the reversal, then?

Since Burr's actions were so manifestly within both party and Constitutional bounds up until the receipt of Jefferson's letter, it appears that Burr's offer at this juncture might have been an indirect, if perhaps unconscious, response to Jefferson's mixed messages. It was as though Burr was responding to Jefferson's subtext like it was a coded message asking him to perform a secret mission. If so, Jefferson never gave any further indication of his motives nor offered Burr any further explanation. Indeed, there is no indication that Jefferson was aware he had conveyed anything to Burr, and, as we shall see, the suggestion that Burr wanted something more than the vice presidency seems to have hung over Jefferson's mind.

In his December 15 letter, Jefferson had exposed a deep vulnerability to Burr by confessing to Burr his lack of self-assurance at such a key moment. Even if one assumes that Jefferson's pessimistic tone was merely manipulative, intended to garner Burr's support and zeal, there is

¹⁰⁰ *Id.*

still something odd about him writing to Burr for reassurances. Given Jefferson's later disproportionate sense of betrayal by Burr, it seems likely that Jefferson was indeed reaching out to the man who had single-handedly won New York—and potentially the presidency—for him.

Jefferson's revelation of his vulnerability need not have been of a highly unexpected, spectacular, or nefarious nature to be significant. In essence, Jefferson revealed a deep, personal secret to Burr—that he was afraid and vulnerable. Jefferson revealed this fact to a man who had long since conquered his own fears, and Jefferson knew this. Burr's courage and daring were well known, while the specter of Jefferson's cowardice, as I demonstrate later, had just recently risen again. Jefferson's fears swirled around him and he had invited Burr in on the secret.

When Jefferson read Burr's responding letter, an invisible, even forbidden bond formed between them. Jefferson had, psychologically speaking, in effect, made Burr his master. It is doubtful that either man actually recognized this interplay, but on some level Jefferson had to have wondered whether Burr would expose him to the world and Burr must have had the sense that he held some special power in his pocket.¹⁰¹ Most remarkably, especially given posterity's judgment against Burr, Burr never used this power against Jefferson, although it is clear that he was sorely tempted to do so and could have on more than one occasion.

However, while Burr did respond to Jefferson with assurances, his initial responses to the events that were building around him were not particularly paternal or protective. The day after writing reassurances to Jefferson, he wrote to Samuel Smith that he had “not now time to quarrel with Phantoms.”¹⁰² Yet, it seems that quarreling with phantoms was exactly what Burr was about to do.

THE TIE

Burr's actions between mid-December 1800 and mid-February 1801 have been the subject of much controversy and criticism. However, both contemporary actors and observers and later scholars appear

¹⁰¹ This interpretation is supported by Jefferson's description in his *Anas* of an 1806 meeting between Burr and himself. Jefferson stated that Burr suggested he harbored some secrets about Jefferson. One of these appears to have been Burr's knowledge of Jefferson's understanding with the Federalists to obtain the latter's election. This, however, does not preclude the existence of the secret compact. See 2 PUBLIC PAPERS, *supra* note 1, at 962-3.

¹⁰² Letter from Aaron Burr to Samuel Smith (Dec. 24, 1800), in 1 PUBLIC PAPERS, *supra* note 1, at 475.

to have missed the constitutional issue involved in Burr's decisions. They have also failed to consider the evidence of Burr's lifelong adherence to Republican principles—the principles of the American Revolution. One can understand Burr's actions only by viewing them in the light of these two factors.

As an aside, the defect in the Constitution was later tacitly acknowledged by the United States Congress when it voted to amend Article II, § 1, Paragraph 3 in 1804. Burr, still in office as vice president and president of the Senate, absented himself from the vote. The vote resulted in the enactment of the Twelfth Amendment.

Yet, in the two months of uncertainty in early 1801 before the deadlock was broken in the House of Representatives, while aware of the danger of “usurpation,” no one was thinking about the Constitution. They were, not surprisingly, thinking about party loyalty. Before uncertainty arose about Burr's intentions, one newspaper writer declared that Burr was “*too proud to submit to the leading-strings of the vilest faction that ever disgraced a free country.*”¹⁰³ The primary concern of Burr's fellow Republicans appears to have been whether he would remain loyal to them, rather than whether he would remain loyal to the Constitution.

Indeed, the idea of loyalty to the Constitution seems to have been oddly absent. Few seem to have been capable of consciously grasping the distinction made by Republican George Hay, who wrote that “[i]f the majority of the House choose Burr[,] the people will submit, because such an election, though contrary to their wishes, would be constitutional.”¹⁰⁴ While Hay grasped the constitutional issue, he overlooked the fact that the “will of the people” can be manifest in votes of the House of Representatives as well as in votes of the Electoral College. That was the reason behind the Framers' constitutional stipulation that if there was a tie for the presidency, the vote should go to the House. It was and continues to be a fail-safe clause.

Another politician who may have understood the constitutional issue was Federalist Robert Goodloe Harper. On December 24, 1800, he wrote Burr: “I advise you to take no step whatever by which the choice

¹⁰³ 1 PUBLIC PAPERS, *supra* note 1, at 491 n.1 (quoting the Boston newspaper the INDEPENDENT CHRONICLE (Jan. 5-8, 1801) (emphasis in original)).

¹⁰⁴ BEVERIDGE, *supra* note 22, at 542-3 (1919) (quoting from the Aurora (Feb. 9, 1801)). George Hay was James Monroe's son-in-law, and would later be the United States Attorney General who prosecuted Burr in his trial for treason. *Id.*

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 115

of the [H]ouse of Representatives can be impeded or embarrassed.”¹⁰⁵ But again, it is not clear whether Harper really considered “the choice of the House” to mean “the will of the people,” or whether he simply meant “the choice of the Federalists” (or, for that matter, his own choice).¹⁰⁶

But, while Hay, a Republican, and possibly Harper, a Federalist, appeared to be the only ones grappling with the notion that a House election was constitutional, many Republicans were not able to grasp this idea in the midst of the crisis. To them, Burr’s refusal to resign if elected by the House was simply a treasonous act.

Despite over two hundred years of misleading scholarship about Burr’s intentions, Burr’s correspondence, when viewed from a constitutional perspective, is fairly clear and consistent. On December 16, 1800, Burr wrote Samuel Smith that if Burr and Jefferson tied, “every Man who knows me ought to know that I should utterly disclaim all competition” and added that his friends “would dishonor my Views and insult my feelings by harbouring [sic] a suspicion that I could submit to be instrumental in Counteracting the Wishes & expectations of the U.S.”¹⁰⁷ Smith apparently took this to mean that Burr would resign if elected, but Burr did not say that. He said he would not “Counteract the Wishes and expectations *of the U.S.*”¹⁰⁸

Burr’s reliance upon the wishes of the United States was not in conflict with his statement that his friends would “never think of diverting a single Vote from [Jefferson],”¹⁰⁹ nor was it in conflict with his refusal to resign. Indeed, Burr’s refusal to resign if elected was completely consistent with his reliance on the wishes of the people. When Burr said that he disclaimed competition, he meant that he would not arrange to have votes (presumably either electoral or House votes) diverted away from Jefferson in order to have himself elected. Burr did not mean that he would not serve if elected.

¹⁰⁵ Letter from Robert Goodloe Harper to Aaron Burr (Dec. 24, 1800), *in* 1 PUBLIC PAPERS, at 474. *See also* Robert Goodloe Harper’s 1805 deposition, 128, accompanying text (stating the Federalist decision to vote for Burr was “as the constitution authorized”).

¹⁰⁶ Harper’s choice was, of course, Burr. Jefferson described a conversation he had with John Adams in which Adams purportedly told him that if Jefferson only would “do justice to the public creditors, maintain the navy, and not disturb those holding offices . . . the government will be instantly put into your hands. We know it is the wish of the people it should be so.” Letter from Thomas Jefferson to Dr. Benjamin Rush (Jan. 16, 1811) *in* KOCH & PEDEN, *supra* note 21, at 559.

¹⁰⁷ Letter from Aaron Burr to Samuel Smith (Dec. 16, 1800), *in* 1 PUBLIC PAPERS, at 471.

¹⁰⁸ *Id.* [emphasis added].

¹⁰⁹ Letter from Aaron Burr to Thomas Jefferson (Dec. 23, 1800), *in id.* at 474.

Burr explained to Smith on December 29th that he would not “engage to resign” if chosen president, adding that “[t]he question was unnecessary, unreasonable and impertinent.”¹¹⁰ On January 16, 1801, Burr elaborated to William Eustis that his statement that he would not counteract the wishes of the U.S. “was a pledge of good faith only—resignation was never thought of—It would be absurd & unpardonable even in the Eyes of D[emocrat]s.”¹¹¹ He added that his initial letter to Smith, in which he disclaimed competition, had already been explained, but that “[t]he feds pay no attention to it but go on as though Nothing has been said or done by A[aron].”¹¹² Burr later wrote to Smith, “[y]ou seem to believe every lie you hear.”¹¹³

Even Burr’s most ambiguous statement, “if it should happen that the two [Republican] Candidates come out even . . . no Man will join with more sincerity than I shall, to place Jefferson in the Chair; and we know it to be in our power,”¹¹⁴ does not contradict his statement that he would not counteract the wishes of the people. Burr was referring to the possibility that the Federalists might attempt to buy the votes of Republican congressmen, in which case Burr felt that the Republicans would nonetheless retain the power to win the election. This interpretation is supported by his reassuring letter to Jefferson in which Burr repeatedly confirms the “unanimous . . . support” for Jefferson’s election.¹¹⁵ Burr was saying that he was confident that the Republicans were in the majority and that the majority of the Republicans supported Jefferson. He did not mean that if a majority of the states, as represented in Congress, chose him (Burr), he would refuse to stand. A refusal to stand would be tantamount to going against the will of the people.

It is worth mentioning that what the Republicans proposed that Burr do was exactly what they feared the Federalists would do: usurp the election. The Republicans proposed that Burr subvert the will of the “people” by superimposing the Republican party’s will onto the outcome of the election (i.e., resign), in case he was chosen by the majority of the House. They were proposing, in effect, that Burr ignore the language of the Constitution, which declared in the event of a tie, the vote

¹¹⁰ Letter from Aaron Burr to Samuel Smith (Dec. 29, 1800), *in id.* at 479.

¹¹¹ Letter from Aaron Burr to William Eustis (Jan. 16, 1801), *in id.* at 491.

¹¹² *Id.* at 490.

¹¹³ Letter from Aaron Burr to Samuel Smith (Feb. 4, 1801), *in id.* at 498.

¹¹⁴ Letter from Aaron Burr to John Taylor of “Caroline” (Dec. 18, 1800), *in id.* at 473.

¹¹⁵ Letter from Aaron Burr to Thomas Jefferson (Dec. 23, 1800), *in id.* at 474.

2003] AARON BURR AND THE ELECTORAL TIE OF 1801 117

would be taken by the House. They were clearly proposing that Burr ignore the vote of the majority of the House and resign in favor of their party's preference. In Burr's eyes, this was unconstitutional. The Jeffersonians apparently seemed willing to ignore the constitutional question. They only saw that Burr, having campaigned for the Republican party, now refused to follow their will. This was a betrayal to the Jeffersonians.

Remember that when Burr campaigned for his party, he campaigned hard, but he did so because he agreed with Republican principles, not because he possessed an unthinking loyalty to the party. Furthermore, Burr allowed himself to be made a candidate in spite of his feelings of mistrust for the party leaders.

Despite Burr's Republican principles, his affiliations with the Federalists were fairly numerous and broad, and, as we noted earlier, there were Federalists who genuinely wanted Burr elected president.¹¹⁶ Some Federalists even believed that there were numerous Republicans who were "more disposed to vote for Mr. Burr than Mr. Jefferson."¹¹⁷ Believing that these Republicans would eventually "excuse themselves" and "give their votes for Mr. Burr, the man they really preferred," some Federalists believed that their votes should go to Burr.¹¹⁸

The Federalists' preference for Burr was not, of course, limited to their belief that some Republicans might choose him. Federalist Theodore Sedgwick wrote his son a long list of reasons why Federalists were considering Burr:

The considerations concluding to this point are of a negative nature, principally, and drawn from the greater unfitness of Jefferson—Burr is not a Democrat—He is not an enthusiastic theorist—He is not under the direction of Virginia Jacobins—He is not a declared infidel—He is not publicly [sic] committed against the great systems of the administration—He has not denounced all of worth & virtue in his own to foreign countries—He has not—at least it is not generally known that he has while acting in an official capacity[—]declared gross falsehoods as did Jefferson when he took the chair of the senate—He is not attached to any foreign nation, and his selfishness will prevent his

¹¹⁶ See Mary-Jo Kline, *Editorial Note: The Electoral Tie of 1801*, in *id.* at 481.

¹¹⁷ *Id.* (quoting Federalist James A. Bayard, Deposition (Jan. 20, 1806)).

¹¹⁸ *Id.* See also *id.* (citing deposition of Robert Goodloe Harper (Jan. 20, 1806), Diary of Gouverneur Morris (Dec. 25, 26, 1800), and Letter from Theodore Sedgwick to his son (Jan. 11, 1801)).

ever being so—He is not an enemy to the navy, to commerce or national policy—He will not be able to administer the government without the aid of the federalists & this aid he cannot obtain unless his administration is federal.¹¹⁹

It seems likely that Burr, more a lawyer than a politician, or perhaps more cerebral and detached than his colleagues, viewed the political system as relying upon a set of hierarchical principles, rather than upon several sets of personal loyalties. The overarching principle for Burr was the text of the Constitution, which was formed from the values set forth in the Declaration of Independence and fought for during the Revolutionary War. Burr viewed the Constitution as the embodiment of those values, and the Republican party as the best, but not necessarily the only, vehicle for their expression.¹²⁰ His primary adherence was to the values themselves, which may have been better expressed in a coalition Republican/Federalist government, similar to the union he had formed between the Republican factions in New York in the spring of 1800, than in a pure Republican (i.e. Jeffersonian) government.

Burr was the only candidate who could have headed such a coalition, and he knew it. However, Burr's adherence to a strict interpretation of the Constitution required that he refrain from interfering with the vote. While he had been active during the campaign before he had been chosen as the Republican candidate for vice president, Burr now followed the same course Jefferson had before by adhering to the requirements of "decency" and remaining "entirely passive" during the vote.

Burr's strict interpretation of the Constitution was not the only possible interpretation, or even necessarily the correct one, but it was certainly consistent with the anti-partisan sentiments espoused by the *Federalist Papers*. Clearly, this view did not include the use of behind-the-scenes negotiations in the House in order to secure the election. There is nothing in the Constitution that specifically forbids such negotiations. Hence, a broader interpretation than Burr's might have been valid. Burr's position is the more principled one, considering the clear intent of the Framers. It appears, however, that at the time, there was

¹¹⁹ See Washington Federalist (Jan. 21, 25 & Feb. 6, 1801) in 2 BEVERIDGE, *supra* note 22, at 540-1 n.2 (expressing similar sentiments).

¹²⁰ See Letter from Aaron Burr to Thomas McElderry (Feb. 28, 1801), in 1 PUBLIC PAPERS, *supra* note 1, at 510 ("Every thing of a personal nature was discarded on that occasion; and we have not to rejoice at the exaltation of two men, but in the triumph of principle.").

2003] *AARON BURR AND THE ELECTORAL TIE OF 1801* 119

no legislative or collegial discussion on the matter. Rather than a reasoned discussion among politicians, panic and accusation prevailed.

Although he never betrayed the Constitution or the will of the people, the question of betrayal on a personal level remains open. As noted above, it seems possible that a secret compact was formed, at least in the recesses of Jefferson's mind, between Burr and Jefferson after (if not before) Jefferson wrote his worried letter of December 15, 1800. By responding reassuringly to that letter, Burr arguably created an implied contract to protect Jefferson and his image. Then, by refusing to further reassure Jefferson that he would resign if elected, Burr betrayed this promise. In fact, he publicly humiliated Jefferson. Of course, this was not a valid and legal contract, since there was no consideration (what? you protect my image, I'll give you the vice presidency?). Nor is it likely that either Burr or Jefferson were conscious of the existence of this pact. Nonetheless, it arguably had an imperious effect on subsequent events.

Given Burr's strict interpretation of the Constitution, his real choice was between a vague, unspoken personal vow of fealty to Jefferson on the one hand, and his "public" obligation to the Constitution on the other. From a review of Burr's correspondence, it appears that Burr did indeed view the situation in this way. While he wrote reassuringly to Jefferson and never wavered from that tone even after the election, Burr repeatedly restated his view that he would not consider resigning if elected. If this was indeed how Burr viewed his choices, it seems clear that his foremost obligation was to both the Constitution and the will of the people. Furthermore, given that Burr's own sense of loyalty to the southern Republicans had been severely undermined by their repeated betrayals, it is easy to understand why he did not feel as strong a sense of personal devotion to them as he might have previously. He obviously had created a distinction in his own mind between the Republicans and the Republican cause.

This internal distinction had a secondary effect which Burr likely did not realize. It caused each of his actions to carry an alternative meaning. His campaign was motivated, in fact, solely by his loyalty to Republican principles, while members of the Republican party, particularly the southern Republicans, interpreted his actions as representative of his loyalty to the party. Burr likely explained this distinction to his close followers, but surely did not express it to the southern Republicans (and it would have been pointless to do so, since the Republicans would likely have believed that it was a distinction without a difference).

Thus, when he acted in concert with his beliefs in Republicanism in the abstract (and in concert with the Constitution), but not in concert with the wishes of the Republicans (that he do something he considered unconstitutional), the Republicans felt deceived and betrayed.

As for Jefferson's solicitations, the dolorous, imploring tone of his December letter to Burr raises questions regarding Jefferson's sense of his legitimacy as a candidate. What protection did Jefferson actually want? Jefferson had personally experienced the public's disfavor in 1781 when he was governor of Virginia; when he abandoned his post at the moment of imminent invasion by the British, he was investigated by the Virginia House of Delegates. Although he was exonerated, this incident was used by his political enemies to show that he was unfit for office.¹²¹

However, notwithstanding the clear reasons for Jefferson's insecurity, his relationship with Burr cannot be seen as having naturally or inevitably followed from that mental/emotional condition. Jefferson's solicitation appears to have been focused on the establishment of a particular sort of relationship. Jefferson was proposing that Burr play a distinct role in his life: his protector. Not exactly the office for which Burr was running.

In any case, Jefferson's letter must have been an embarrassment to him in the weeks that followed its writing. His fears that Burr might betray him to an unkind and unforgiving public were confirmed by Burr's refusal to resign. From Jefferson's viewpoint, Burr had, in a psychological sense, thrown him to the wolves, something Jefferson never forgot and never forgave.¹²² Of course, as discussed earlier, Jefferson and his friends had more than once done the same to Burr, but Jefferson apparently considered that to be a matter of expediency, not a personal betrayal. The hypocrisy in this attitude is undeniable and significant in view of Jefferson's later claims of Burr's hypocrisy.

Jefferson's sense of betrayal quickly increased and solidified, nourished by several second- and third-hand reports that gave details of intrigues attributed to Burr. Jefferson recorded that Representative Edward Livingston, Senator John Armstrong (who later became one of

¹²¹ See TJRB, *supra* note 5, at 6-7 (1986). See also BEVERIDGE, *supra* note 22, at 540 n.2 (quoting the Washington Federalist, Jan. 21, 25 & Feb. 6, 1801, comparing Burr and Jefferson as candidates) ("[Burr] never shrank from the post of danger.").

¹²² Gouverneur Morris wrote in his diary (Dec. 26, 1800) that Jefferson was "as I supposed much wounded at th[e] information" that Morris gave to Wilson Cary Nicholas in Jefferson's presence, that it was "the opinion not of light and fanciful but of serious and considerate Men that Mr. Burr must be preferred to Mr. Jefferson." 1 PUBLIC PAPERS, *supra* note 1, at 967 n.7.

Burr's most implacable enemies), and Senator Wilson Cary Nicholas all told him of the machinations of James A. Bayard, who purported to operate in Burr's name. Bayard, according to Jefferson's friends, had approached Samuel Smith and Edward Livingston with offers of appointments if they voted for Burr.¹²³

There is no evidence that Burr authorized Bayard to act in his name, and, in fact, Bayard's own words, both at the time and subsequently, indicate that Burr had never given Bayard such authorization nor had any knowledge of his doings, as do the sworn statements of several others.¹²⁴ Jefferson was a lawyer, and he ought to have known that the information he was receiving from his friends was hearsay. Indeed, it was double hearsay. Not only were Jefferson's friends testifying to what Bayard had said, they were also testifying to what Bayard had said Burr had said. Jefferson nonetheless apparently gave credence to these statements.¹²⁵

Since Burr's colleagues did not consider the Constitution as the guiding force, they viewed Burr's actions as hypocritical, if not treasonous. This viewpoint was eventually adopted by many contemporary commentators, and it is one that has haunted Burr and his image ever

¹²³ See 2 PUBLIC PAPERS, *supra* note 1, at 967 n.6 (Jefferson's contemporary notes dated Feb. 12, 1801). Armstrong (who was married to a Livingston) was once a Federalist, but became "weary of waiting for federal honors," and had turned Republican by 1800. He subsequently became Jefferson's Minister to France. See 1 PUBLIC PAPERS, *supra* note 1, at 454 n.1, 499 n.3. While Burr was in exile in France, Armstrong refused to give Burr a passport to return to the United States. 2 PUBLIC PAPERS, *supra* note 1, at 1126. Burr described him as "for many years . . . my personal and political enemy." Letter from Aaron Burr to Constantin-Francois Chasseboeuf, comte de Volney (Aug. 5, 1810) in 2 DAVIS, *supra* note 80, at 31. Armstrong was also a leader in the "Newburg Conspiracy" of 1783, an insurrection against the Revolutionary Congress. 1 PUBLIC PAPERS, *supra* note 1, at 454., n.1. See also JAMES T. FLEXNER, THE YOUNG HAMILTON: A BIOGRAPHY 407-9 (1978). Two years later, a declaration by Edward Livingston was published at Burr's request in the New York City *Morning Chronicle*, in which Livingston stated, "[i]n consequence of certain insinuations lately circulated, I think it proper to declare, that you did not, in any verbal or written communication to me, during the late presidential election, express any sentiment inconsistent with those contained in your letter to General Smith . . . or evincing any desire that the vote of the state should be transferred from Mr. Jefferson to yourself." (letter dated July 27, 1802, published Apr. 28, 1803), 2 PUBLIC PAPERS, *supra* note 1, at 732.

¹²⁴ See 1 LOMASK, *supra* note 36, at 293 quoting Letter from Bayard to his father-in-law (Feb. 16, 1801) ("Burr has acted a miserable paltry part. The election was in his power, but he was determined to come in as a Democrat, and in that event would have been the most dangerous man in the community. We have been counteracted in the whole business by letters he has written to this place.").

¹²⁵ Jefferson apparently heard other hearsay reports which he credited. See FLEMING, *supra* note 17, at 127-8 (quoting Jefferson's notes of Jan. 2, 1804 in which Jefferson related a story told him by Colonel Hitchburn of Massachusetts, saying that he heard Burr say to Smith that "[o]ur friends must join the Federalists"). This was not corroborated by Smith's own letters and testimony.

since. But, this view is based upon the erroneous assumption that every man's actions are based on party loyalties, and that no actions are (or ought to be) based upon those higher principles upon which everyone claims to rely. In other words, we assume that the Constitution is subordinate to party loyalties, and measure every act by the standard of loyalty to great men, rather than to the Constitution.

After more than two hundred years of accumulation and solidification of negative opinions regarding Burr, it will perhaps be difficult for historians and scholars to believe that Burr could have acted ethically, but this interpretation ought to be given full and fair consideration. To the extent that Burr's own words were ambiguous, these ambiguities are easily resolved by viewing them in light of Constitutional principles.

If Burr acted in strict adherence to the principles of the Constitution, the Declaration of Independence, and the Revolutionary War, he cannot be faulted because no one else did. Furthermore, given that Burr adhered to principles upon which his country was formed, it does not seem farfetched to conclude that Burr believed that others shared his general viewpoint. Hence, he did not find it necessary to set forth in great detail the pattern of his thoughts, or even be able to fully frame them for himself.

None of this means that Burr's colleagues were unpatriotic or despotic. It is evident, though, that Burr's compatriots were operating in a state of virtual panic. Burr noted this on several occasions when he called his colleague's reactions "absurd alarms." Later, when there was no longer "any apprehens[ion] of Usurpation," he wrote Samuel Smith, "but your Nerves were a little out of order."¹²⁶ Burr wrote at more length on this subject to Jefferson on February 12, 1801, once again reassuring the President-elect that "[i]t was so obvious that the most malignant Spirit of slander and intrigue would be busy that, without any enquiry [sic], I set down as calumny every tale calculated to disturb our harmony," adding that "[m]y friends are often more irritable and more credulous: fortunately I am the depository of all their Cares and anxieties and I invariably pronounce to be a lie, every thing which ought not to be true."¹²⁷

¹²⁶ Letters from Aaron Burr to Samuel Smith (Dec. 29, 1800), and Burr to Smith (Feb. 4, 1801), *in* 1 *PUBLIC PAPERS*, *supra* note 1, at 479, 497.

¹²⁷ Letter from Aaron Burr to Thomas Jefferson (Feb. 12, 1801), *in id.* at 501.

CONCLUSION AND EPILOGUE

Four years after the election, Burr instituted a seven-count libel suit against James Cheetham, editor of the *American Citizen*. Cheetham's attorney initially suggested that they confine the case to Cheetham's published claim that Burr was guilty of "intriguing to advance himself to the Presidency of the United States, contrary to the wishes of the Republican party," but Burr's counsel later agreed to focus only on Cheetham's claims that Burr had attempted to "counteract the wishes & expectations of the people" and that Burr had carried on negotiations with Federalists.¹²⁸

This suit afforded Burr the opportunity to gather statements from key persons involved in the electoral tie who could testify that he had not intrigued to steal the election from Jefferson. Federalist Robert Goodloe Harper declared that "no measures . . . were suggested or presented by any person whatever to secure the election of Aaron Burr to the presidency; other than the resolution of the abovementioned members to vote for him, in preference to the said Thomas Jefferson, as the constitution authorized & their duty in their opinion required."¹²⁹ Harper continued that Burr had not "made any declaration whatever concerning the election of president, further than is contained in a letter . . . by him to Samuel Smith," and that it was within the power of Burr "himself to secure those votes; & that had he used with vigor & address the means [which] Certainly were in his power, & which this Deponent is firmly persuaded were used against him, he would have obtained the votes of three more states at least, &, consequently would have been President."¹³⁰

In January 1801, James A. Bayard wrote Smith that "[b]y deceiving one Man (a great blockhead) and tempting two (not incorruptible)[,] [Burr] might have secured a majority of the States," but added that Burr had made "little use" of that opportunity.¹³¹ Five years later, in a deposition for a "wager-suit," Bayard stated that Jefferson had made a bargain with the Federalists during the election.¹³² Bayard claimed that he

¹²⁸ 2 PUBLIC PAPERS, *supra* note 1, at 871 n.4. (apparently no one noticed Cheeetham equating "the wishes of the Republican party" with the wishes of the people).

¹²⁹ *Id.* at 873 (quoting from Deposition of Robert Goodloe Harper) (Harper was one of the leading Federalist spokesmen in the House).

¹³⁰ *Id.*

¹³¹ 1 PUBLIC PAPERS, *supra* note 1, at 487 (quoting from letter from James Bayard to Alexander Hamilton (Mar. 8, 1801)).

¹³² *Id.* at 965-7 n.5 (quoting from Deposition of James A. Bayard (Apr. 3, 1806)).

had asked Smith to ask Jefferson to concede certain points. According to Bayard, Smith had obtained these concessions from Jefferson, and had claimed that he, Smith, “was authorized by [Jefferson] to say that [Bayard’s points] corresponded with [Jefferson’s] views and intentions, and that we might confide in him accordingly.”¹³³

Smith also gave a deposition in this later suit. His account differed only slightly from Bayard’s on this point. According to Smith, Jefferson had only stated his general agreement with the points. Smith said that he told Bayard that Bayard “might rest assured . . . that Mr. Jefferson would conduct, as to those points, agreeably to the opinions I had stated as his.”¹³⁴ According to both Bayard and Smith, the Federalists changed their votes based on this conversation, in favor of Jefferson.

Jefferson denied any complicity. He wrote that “neither [Smith], nor any other republican ever uttered the most distant hint to me about submitting to any conditions or giving any assurances to any body,” or were “ever authorised [sic] by me to say what I would or would not do.”¹³⁵ However, the account of his close friend, Samuel Smith, shows that Jefferson was aware of his acquiescence to the general import of the Federalists’ terms. Even four years later, Smith did not waver from this account. Because he was Jefferson’s closest friend, his is the most plausible account. Smith’s declaration of Jefferson’s acquiescence was an admission against interest. However, Smith’s and Jefferson’s accounts are not in conflict. Jefferson might not have authorized anyone to say what he would or would not do, but he still might have allowed Smith to let his general views be known in a manner that indicated his acquiescence to Federalist views. If true, this would be another example of pure Jeffersonian doublespeak.

Furthermore, it is hard to believe that Jefferson was unaware of the import of the message he was entrusting to Smith. It seems likely that Jefferson spoke in such a way that allowed the Federalists to believe he acquiesced while maintaining plausible deniability. Whether Jefferson had actually authorized Smith to concede the points and “confide in

¹³³ *Id.*

¹³⁴ *Id.* at 967 n.5 (quoting from Deposition of Samuel Smith (Apr. 15, 1806)).

¹³⁵ Thomas Jefferson, Memorandum of a Conversation with Burr (Apr. 15, 1806) in 2 PUBLIC PAPERS, *supra* note 1, at 964 (from Jefferson’s “Anas”); *see also* letter from Thomas Jefferson to Dr. Benjamin Rush (Jan. 16, 1811), in KOCH & PEDEN, *supra* note 21, at 559. (Jefferson claims he said to Adams: “I say, however, I will not come into the government by capitulation. I will not enter on it, but in perfect freedom to follow the dictates of my own judgment”)(Jefferson adds that he had “before given the same answer to the same intimation from Gouverneur Morris”).

2003] *AARON BURR AND THE ELECTORAL TIE OF 1801* 125

him accordingly,” or had merely intimated his acquiescence to their general import, the Federalists changed their votes because they believed that Jefferson did concede. No vote was changed because of any action by Burr.

Matthew L. Davis wrote Burr years later that the “history of [those] times are enveloped in thick darkness.”¹³⁶ Burr, however, realized in 1804 when he wrote Robert Goodloe Harper that “our little world as you say is pregnant, but the Gestation will be longer & the parturition more remote, probably, more critical, than you seem aware.”¹³⁷

On October 21, 1803, an amendment to the Constitution was proposed that required presidential electors to “name in distinct ballots the person voted for as President and the person voted for as Vice President.” The bill passed the Senate on December 3, 1803. Burr, still in office as vice president, usually presided over the Senate. However, during the debates and vote on this amendment, Burr was absent. By December 11, 1803, the bill had passed the House and became the Twelfth Amendment to the United States Constitution.

¹³⁶ Letter from Matthew L. Davis to Aaron Burr (Mar. 18, 1830), in 2 PUBLIC PAPERS, *supra* note 1, at 1202.

¹³⁷ Letter from Aaron Burr to Robert Goodloe Harper (May 29, 1804), *in id.* at 870.

Appendix A

Thomas Jefferson's letter to Aaron Burr
(December 15, 1800)

Aaron Burr's letter to Thomas Jefferson
(December 23, 1800)

SOURCE: W. C. Ford, "Some Papers of Aaron Burr," *American Antiquarian Society Proceedings*, N. S., XXIX (1919), 100-101.

Thomas Jefferson's letter to Aaron Burr (December 15, 1800)

Washington, December 15, 1800

DEAR Sir,

Although we have not official information of the votes for President & Vice President and cannot have until the first week in Feb. yet the state of the votes is given on such evidence as satisfies both parties that the two Republican candidates stand highest. from S. Caroline we have not even heard of the actual vote; but we have learnt who were appointed electors, and with sufficient certainty how they would vote. it is said they would withdraw from yourself one vote. it has also been said that a General Smith of Tennessee had declared that he would give his 2d. vote to Mr. Gallatin; not from any indisposition towards you but extreme reverence to the character of Mr. G. it is also surmised that the vote of Georgia will not be entire. yet nobody pretends to know these things of a certainty, and we know enough to be certain that what it is surmised will be withheld will still leave you four or five votes at least. above Mr. A. however it was badly managed not to have arranged with certainty what seems to have been left to hazard. It was the more material because I understand several of the high flying federalists have expressed their hope that the two republican tickets may be equal, & their determination in that case to prevent a choice by the H. of R. (which they are strong enough to do,) and let the government devolve on a President of the Senate. decency required that I should be so entirely passive during the late contest that I never once asked whether arrangements had been made to prevent so many from dropping votes intentionally as might frustrate half the republican wish; nor did I doubt till lately that such has been made.

While I must congratulate-you, my dear Sir, on the issue of this contest, because it is more honorable and doubtless more grateful to you than any station within the competence of the chief magistrate, yet for my-

2003] *AARON BURR AND THE ELECTORAL TIE OF 1801* 127

self, and for the substantial service of the public, I feel most sensibly the loss we sustain of your aid in our new administration. it leaves a chasm in my arrangements, which cannot be adequately filled up. I had endeavored to compose an administration whose talents, integrity, names & dispositions should at once inspire unbounded confidence in the public mind, and ensure a perfect harmony in the conduct of the public business. I lose you from the list, & am not sure of all the others. should the gentlemen who possess the public confidence decline taking a part in their affairs, and force us to take persons unknown to the people, the evil genius of this country may realize his avowal that 'he will beat down the administration.' - the return of Mr. Van Benthuyzen, one of your electors, furnishes me a confidential opportunity of writing this much to you, which I should not have ventured through the post office, at this prying season. we shall of course see you before the 4th of March, accept my respectful and affectionate salutations.

TH. Jefferson

Aaron Burr's letter to Thomas Jefferson (December 23, 1800)

Source; DLC: Jefferson. (In 1PPAB, at 474.)

NYork 23 decr. 1800

Dear Sir

Yesterday Mr. Van Benthuyzen handed me your obliging letter. Govr. Fenner is principally responsible for the unfortunate result of the election in R.I. So late as September, he told me personally that you would have every Vote in that State and that A. would certainly have one and probably two: this he confirmed by a Verbal Message to me through a confidential friend in October. He has lately given some plausible reasons for withdrawing his Name from the Republican ticket. I do not however apprehend any embarrassment even in Case the Votes should come out alike for us — My personal friends are perfectly informed of my Wishes on the subject and can never think of diverting a single Vote from you — On the Contrary, they will be found among your most zealous adherents. I see no reason to doubt of your having at least nine States if the business shall come before the H— of Reps.

As far forth as my knowledge extends, it is the unanimous determination of the republicans of every grade to support your administration with unremitting Zeal: indeed I should distrust the loyalty of any one professing to be a Republican who should refuse his services. There is in

128 *CARDOZO PUB. LAW, POLICY & ETHICS J.* [Vol. 1:91

fact no such dearth of Talents or of patriotism as ought to inspire a doubt of your being able to fill every office in a Manner that will command public Confidence and public approbation — As to myself, I will cheerfully (sic) abandon the office of V[ice]. P[resident]. if it shall be thought that I can be more useful in any Active station. In short, my whole time and attention shall be unceasingly employed to render your Administration grateful and honorable to our Country and to yourself — To this I am impelled, as well by the highest sense of duty as by the most devoted personal attachment

ABurr

Appendix B

CHRONOLOGY

- 1787 Constitutional Convention
- 1788-9 Constitution – Manner of Election (Art. II)
- 1788,1792 George Washington elected President
Burr passed over by President Washington in favor of James Monroe for French Ambassabor, due to “machinations” of Republicans.
- 1794 John Adams elected President, Thomas Jefferson elected Vice President, pursuant to Article II of the Constitution.
Jefferson writes that he will defer to Adams if elected President.
- 1796
- 1796 June 20—Burr chosen as Jefferson’s running mate.
September—Burr begins six week campaign throughout New England.
- 1797 Amendment to Article II proposed and defeated.
- 1798 Spring—Burr elected to New York Assembly.
Summer—Alien and Sedition Acts passed. Virginia and Kentucky Resolutions written in response.
- 1799 April 30—Burr loses New York Assembly election.
May 6—Troup says Burr revolutionized state in favor of Republicans.
- 1800 Both Federalist caucus and Republican caucus determine to tie.
March—Burr launches his own newspaper.
April 29 – May1—New York elections.
May—Colleagues applaud Burr’s work; Republicans approach Burr and Governor Clinton (NY) to run for Vice President alongside Jefferson. Burr declines and then consents when Madison promises no southern elector will drop votes. Burr promises to obtain same result in Rhode Island.
July—Burr predicts that Jefferson will win majority of electoral votes.
October 9—Burr writes Madison that Jefferson will receive all Rhode Island’s electoral votes.
October 23—Burr writes to John Taylor of “Caroline,” acknowledging his name has been put forward.
December 15—Jefferson’s letter to Burr.
December 16—Burr’s letter to Samuel Smith, disclaiming competition.

130 *CARDOZO PUB. LAW, POLICY & ETHICS J.* [Vol. 1:91

December 18—Burr communicates to Taylor that Rhode Island vote for Adams and Jefferson is not expected to result in a tie and that Burr supports Jefferson.

December 23—Burr's letter to Jefferson.

December 24—Robert Goodloe Harper to Burr: take no step that will embarrass.

December 24—Burr's letter to Smith: "No time to quarrel with phantoms."

December 29—Burr to Smith: will not resign if elected President.

1801 January 5 – 8—Boston paper for Burr.

January 16—Burr to Eustis: pledge was of good faith, will not resign.

January 21, 25 & February 6—Washington Federalists support Burr.

February 4—Burr to Smith: "you believe every lie."

February 9—Hay contemplates Constitutional question.

February 12—Jefferson's diary entry contains notes on Burr's betrayal.

February 16—Bayard writes that Burr played a paltry part.

February 28—Burr to McElderry: triumph of principle.

March 8—Bayard to Hamilton: Burr made little use of the opportunity.